

**In re: ROBERT B. McCLOY, JR.
HPA Docket No. 99-0020.
Order Denying Petition for Reconsideration.
Filed June 20, 2002.**

HPA – Allowing entry – Place of business – Judicial review – Guarantor – Judicial officer authority – Crawford test – Lewis test – Baird test – Burton test.

The Judicial Officer (JO) denied Respondent's petition for reconsideration. The JO rejected Respondent's contention that based on *Fleming v. United States Dep't of Agric.*, 713 F.2d 179 (6th Cir. 1983), the United States Court of Appeals for the Sixth Circuit had jurisdiction to review *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002). The JO also rejected Respondent's contention that the Department's long-standing position that a horse owner is a guarantor that his or her horse will not be sore when entered in a horse show or horse exhibition is an unexplained extension of *In re Keith Becknell*, 54 Agric. Dec. 335 (1995). The JO further rejected Respondent's contention that the JO improperly changed the administrative law judge's initial decision, stating that, under the Administrative Procedure Act (5 U.S.C. § 557(b)) and the Rules of Practice (7 C.F.R. § 1.145(i)), the JO may adopt or reject an administrative law judge's initial decision. The JO rejected Respondent's contention that *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), cert. denied, 516 U.S. 824 (1995), is inapposite. Finally, the JO rejected respondent's request that the JO consider the proceeding in light of *Lewis v. Secretary of Agric.*, 73 F.3d 312 (11th Cir. 1996); *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994); and *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982).

Colleen A. Carroll, for Complainant.
Respondent, Pro se.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Craig A. Reed, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on May 4, 1999. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on September 4, 1998, Robert B. McCloy, Jr. [hereinafter Respondent], allowed the entry of a horse known as "Ebony Threat's Ms. Professor" [hereinafter Missy] for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ 3). On June 1, 1999, Respondent filed "Respondent's Original Answer"

[hereinafter Answer]. Respondent admits he was the owner of Missy during all times material to this proceeding but denies he allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Answer ¶¶ 2-4).

Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] presided at a hearing in Oklahoma City, Oklahoma, on August 22, 2000. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, appeared on behalf of Complainant. Respondent appeared pro se. Allison A. Lafferty assisted Respondent.

On January 3, 2001, Complainant filed "Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof." On April 12, 2001, Respondent filed "Respondent's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof." On July 5, 2001, Complainant filed "Complainant's Reply Brief."

On August 10, 2001, the ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the ALJ concluded Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as alleged in the Complaint, and assessed Respondent a \$2,200 civil penalty (Initial Decision and Order at 13-14).

On November 19, 2001, Complainant appealed to the Judicial Officer. On February 5, 2002, Respondent filed "Respondent's Petition for Appeal of Decision and Order and Answer to the Complainant's Petition for Appeal." On February 25, 2002, Complainant filed "Complainant's Response to Respondent's Appeal of Decision and Order." On February 26, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for consideration and decision.

On March 22, 2002, I issued a Decision and Order: (1) concluding that on September 4, 1998, Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)); (2) assessing Respondent a \$2,200 civil penalty; and (3) disqualifying Respondent for a period of 1 year from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ___, slip op. at 39, 72-73 (Mar. 22, 2002).

On April 22, 2002, Respondent filed "Respondent's Petition for Reconsideration of the Decision and Order Dated March 22, 2002" [hereinafter Respondent's Petition for Reconsideration]. On June 5, 2002, Complainant filed "Complainant's Response to Respondent's Petition for Reconsideration of the

Decision and Order Dated March 22, 2002.” On June 6, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002).

Complainant’s exhibits are designated by “CX.” Respondent’s exhibits are designated by “RX.” Transcript references are designated by “Tr.”

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

....

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

....

(3) The term “sore” when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1822. Congressional statement of findings

The Congress finds and declares that—

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1823. Horse shows and exhibitions

(a) Disqualification of horses

The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

. . . .

(c) Appointment of inspectors; manner of inspections

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (c) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (c) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

....

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

....

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this

section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than \$3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than \$3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

....

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1823(a), (c), 1824(2), 1825(b)(1)-(2), (c), (d)(5), 1828.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

....

PART VI—PARTICULAR PROCEEDINGS

....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the “Federal Civil Penalties Inflation Adjustment Act of 1990”

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) “civil monetary penalty” means any penalty, fine, or other sanction that—

(A)(i) is for a specific monetary amount as provided by Federal

- law; or
- (ii) has a maximum amount provided for by Federal law; and
 - (B) is assessed or enforced by an agency pursuant to Federal law; and
 - (C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and
- (3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION
ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

- (1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq.*], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq.*], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 *et seq.*], or the Social Security Act [42 U.S.C. 301 *et seq.*], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and
- (2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

- (1) multiple of \$10 in the case of penalties less than or equal to \$100;
- (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
- (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
- (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
- (5) multiple of \$10,000 in the case of penalties greater than

\$100,000 but less than or equal to \$200,000; and

(6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note (Supp. V 1999).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

....

PART 3—DEBT MANAGEMENT

....

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—*

....

(2) *Animal and Plant Health Inspection Service.* . . .

....

(vii) Civil penalty for a violation of Horse Protection Act, codified at

15 U.S.C. 1825(b)(1), has a maximum of \$2,200[.]

7 C.F.R. § 3.91(a), (b)(2)(vii).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

....

PART 11—HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected in a standard dictionary, such as “Webster’s.”

....

Designated Qualified Person or *DQP* means a person meeting the requirements specified in § 11.7 of this part who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

Exhibitor means (1) any person who enters any horse, any person who allows his horse to be entered, or any person who directs or allows any horse in his custody or under his direction, control or supervision to be entered in any horse show or horse exhibition; (2) any person who shows or exhibits any horse, any person who allows his horse to be shown or exhibited, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be shown or exhibited in any horse show or horse exhibition; (3) any person who enters or presents any horse for sale or auction, any person who allows his horse to be entered or presented for sale

or auction, or any person who allows any horse in his custody or under his direction, control, or supervision to be entered or presented for sale or auction in any horse sale or horse auction; or (4) any person who sells or auctions any horse, any person who allows his horse to be sold or auctioned, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be sold or auctioned.

....

§ 11.7 Certification and licensing of designated qualified persons (DQP's).

(a) *Basic qualifications of DQP applicants.* DQP's holding a valid, current DQP license issued in accordance with this part may be appointed by the management of any horse show, horse exhibition, horse sale, or horse auction, as qualified persons in accordance with section 4(c) of the Act, to inspect horses to detect or diagnose soring and to otherwise inspect horses, or any records pertaining to any horse for the purpose of enforcing the Act. Individuals who may be licensed as DQP's under this part shall be:

(1) Doctors of Veterinary Medicine who are accredited in any State by the United States Department of Agriculture under part 161 of chapter I, title 9 of the Code of Federal Regulations, and who are:

- (i) Members of the American Association of Equine Practitioners, or
- (ii) Large animal practitioners with substantial equine experience, or
- (iii) Knowledgeable in the area of equine lameness as related to soring and soring practices (such as Doctors of Veterinary Medicine with a small animal practice who own, train, judge, or show horses, or Doctors of Veterinary Medicine who teach equine related subjects in an accredited college or school of veterinary medicine). Accredited Doctors of Veterinary Medicine who meet these criteria may be licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department under this part without undergoing the formal training requirements set forth in this section.

(2) Farriers, horse trainers, and other knowledgeable horsemen whose past experience and training would qualify them for positions as horse industry organization or association stewards or judges (or their equivalent) and who have been formally trained and licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department in accordance with this section.

(b) *Certification requirements for DQP programs.* The Department will not license DQP's on an individual basis. Licensing of DQP's will be accomplished only through DQP programs certified by the Department and initiated and maintained by horse industry organizations or associations. Any horse industry organization or association desiring Department

certification to train and license DQP's under the Act shall submit to the Administrator a formal request in writing for certification of its DQP program and a detailed outline of such program for Department approval. Such outline shall include the organizational structure of such organization or association and the names of the officers or persons charged with the management of the organization or association. The outline shall also contain at least the following:

(1) The criteria to be used in selecting DQP candidates and the minimum qualifications and knowledge regarding horses each candidate must have in order to be admitted to the program.

(2) A copy of the formal training program, classroom and practical, required to be completed by each DQP candidate before being licensed by such horse industry organization or association, including the minimum number of hours, classroom and practical, and the subject matter of the training program. Such training program must meet the following minimum standards in order to be certified by the Department under the Act.

(i) Two hours of classroom instruction on the anatomy and physiology of the limbs of a horse. The instructor teaching the course must be specified, and a resume of said instructor's background, experience, and qualifications to teach such course shall be provided to the Administrator.

(ii) Two hours of classroom instruction on the Horse Protection Act and regulations and their interpretation. Instructors for this course must be furnished or recommended by the Department. Requests for instructors to be furnished or recommended must be made to the Administrator in writing at least 30 days prior to such course.

(iii) Four hours of classroom instruction on the history of soring, the physical examination procedures necessary to detect soring, the detection and diagnosis of soring, and related subjects. The instructor teaching the course must be specified and a summary of said instructor's background, experience, and qualifications to teach such course must be provided to the Administrator.

(iv) Four hours of practical instruction in clinics and seminars utilizing live horses with actual application of the knowledge gained in the classroom subjects covered in paragraphs (b)(2)(i), (ii), and (iii) of this section. Methods and procedures required to perform a thorough and uniform examination of a horse shall be included. The names of the instructors and a resume of their background, academic and practical experience, and qualifications to present such instruction shall be provided to the Administrator. Notification of the actual date, time, duration, subject matter, and geographic location of such clinics or seminars must be sent to the Administrator at least 10 days prior to each such clinic or seminar.

(v) One hour of classroom instruction regarding the DQP standards of

conduct promulgated by the licensing organization or association pursuant to paragraph (d)(7) of this section.

(vi) One hour of classroom instruction on recordkeeping and reporting requirements and procedures.

(3) A sample of a written examination which must be passed by DQP candidates for successful completion of the program along with sample answers and the scoring thereof, and proposed passing and failing standards.

(4) The criteria to be used to determine the qualifications and performance abilities of DQP candidates selected for the training program and the criteria used to indicate successful completion of the training program, in addition to the written examination required in paragraph (b)(3) of this section.

(5) The criteria and schedule for a continuing education program and the criteria and methods of monitoring and appraising performance for continued licensing of DQP's by such organization or association. A continuing education program for DQP's shall consist of not less than 4 hours of instruction per year.

(6) Procedures for monitoring horses in the unloading, preparation, warmup, and barn areas, or other such areas. Such monitoring may include any horse that is stabled, loaded on a trailer, being prepared for show, exhibition, sale, or auction, or exercised, or that is otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or auction.

(7) The methods to be used to insure uniform interpretation and enforcement of the Horse Protection Act and regulations by DQP's and uniform procedures for inspecting horses for compliance with the Act and regulations;

(8) Standards of conduct for DQP's promulgated by the organization or association in accordance with paragraph (d)(7) of this section; and

(9) A formal request for Department certification of the DQP program.

The horse industry organizations or associations that have formally requested Department certification of their DQP training, enforcement, and maintenance program will receive a formal notice of certification from the Department, or the reasons, in writing, why certification of such program cannot be approved. A current list of certified DQP programs and licensed DQP's will be published in the *FEDERAL REGISTER* at least once each year, and as may be further required for the purpose of deleting programs and names of DQP's that are no longer certified or licensed, and of adding the names of programs and DQP's that have been certified or licensed subsequent to the publication of the previous list.

(c) *Licensing of DQP's*. Each horse industry organization or association receiving Department certification for the training and licensing of DQP's

under the Act shall:

(1) Issue each DQP licensed by such horse industry organization or association a numbered identification card bearing the name and personal signature of the DQP, a picture of the DQP, and the name and address, including the street address or post office box and zip code, of the licensing organization or association;

(2) Submit a list to the Administrator of names and addresses including street address or post office box and zip code, of all DQP's that have successfully completed the certified DQP program and have been licensed under the Act and regulations by such horse industry organization or association;

(3) Notify the Department of any additions or deletions of names of licensed DQP's from the licensed DQP list submitted to the Department or of any change in the address of any licensed DQP or any warnings and license revocations issued to any DQP licensed by such horse industry organization or association within 10 days of such change;

(4) Not license any person as a DQP if such person has been convicted of any violation of the Act or regulations occurring after July 13, 1976, or paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976, for a period of at least 2 years following the first such violation, and for a period of at least 5 years following the second such violation and any subsequent violation;

(5) Not license any person as a DQP until such person has attended and worked two recognized or affiliated horse shows, horse exhibitions, horse sales, or horse auctions as an apprentice DQP and has demonstrated the ability, qualifications, knowledge and integrity required to satisfactorily execute the duties and responsibilities of a DQP;

(6) Not license any person as a DQP if such person has been disqualified by the Secretary from making detection, diagnosis, or inspection for the purpose of enforcing the Act, or if such person's DQP license is canceled by another horse industry organization or association.

(d) *Requirements to be met by DQP's and Licensing Organizations or Associations.* (1) Any licensed DQP appointed by the management of any horse show, horse exhibition, horse sale or auction to inspect horses for the purpose of detecting and determining or diagnosing horses which are sore and to otherwise inspect horses for the purpose of enforcing the Act and regulations, shall keep and maintain the following information and records concerning any horse which said DQP recommends be disqualified or excused for any reason at such horse show, horse exhibition, horse sale or auction, from being shown, exhibited, sold or auctioned, in a uniform format required by the horse industry organization or association that has licensed

said DQP:

- (i) The name and address, including street address or post office box and zip code, of the show and the show manager.
- (ii) The name and address, including street address or post office box and zip code, of the horse owner.
- (iii) The name and address, including street address or post office box and zip code, of the horse trainer.
- (iv) The name and address, including street address or post office box and zip code, of the horse exhibitor.
- (v) The exhibitors number and class number, or the sale or auction tag number of said horse.
- (vi) The date and time of the inspection.
- (vii) A detailed description of all of the DQP's findings and the nature of the alleged violation, or other reason for disqualifying or excusing the horse, including said DQP's statement regarding the evidence or facts upon which the decision to disqualify or excuse said horse was based.
- (viii) The name, age, sex, color, and markings of the horse; and
- (ix) The name or names of the show manager or other management representative notified by the DQP that such horse should be excused or disqualified and whether or not such manager or management representative excused or disqualified such horse.

Copies of the above records shall be submitted by the involved DQP to the horse industry organization or association that has licensed said DQP within 72 hours after the horse show, horse exhibition, horse sale, or horse auction is over.

(2) The DQP shall inform the custodian of each horse allegedly found in violation of the Act or its regulations, or disqualified or excused for any other reason, of such action and the specific reasons for such action.

(3) Each horse industry organization or association having a Department certified DQP program shall submit a report to the Department containing the following information, from records required in paragraph (d)(1) of this section and other available sources, to the Department on a monthly basis:

(i) The identity of all horse shows, horse exhibitions, horse sales, or horse auctions that have retained the services of DQP's licensed by said organization or association during the month covered by the report. Information concerning the identity of such horse shows, horse exhibitions, horse sales, or horse auctions shall include:

- (A) The name and location of the show, exhibition, sale, or auction.
- (B) The name and address of the manager.
- (C) The date or dates of the show, exhibition, sale, or auction.
- (ii) The identity of all horses at each horse show, horse exhibition, horse

sale, or horse auction that the licensed DQP recommended be disqualified or excused for any reason. The information concerning the identity of such horses shall include:

(A) The registered name of each horse.

(B) The name and address of the owner, trainer, exhibitor, or other person having custody of or responsibility for the care of each such horse disqualified or excused.

(4) Each horse industry organization or association having a Department certified DQP program shall provide, by certified mail if personal service is not possible, to the trainer and owner of each horse allegedly found in violation of the Act or its regulations or otherwise disqualified or excused for any reason, the following information;

(i) The name and date of the show, exhibition, sale, or auction.

(ii) The name of the horse and the reason why said horse was excused, disqualified, or alleged to be in violation of the Act or its regulations.

(5) Each horse industry organization or association having a Department certified DQP program shall provide each of its licensed DQP's with a current list of all persons that have been disqualified by order of the Secretary from showing or exhibiting any horse, or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Department will make such list available, on a current basis, to organizations and associations maintaining a certified DQP program.

(6) Each horse industry organization or association having a Department certified DQP program shall develop and provide a continuing education program for licensed DQP's which provides not less than 4 hours of instruction per year to each licensed DQP.

(7) Each horse industry organization or association having a Department certified DQP program shall promulgate standards of conduct for its DQP's, and shall provide administrative procedures within the organization or association for initiating, maintaining, and enforcing such standards. The procedures shall include the causes for and methods to be utilized for canceling the license of any DQP who fails to properly and adequately carry out his duties. Minimum standards of conduct for DQP's shall include the following;

(i) A DQP shall not exhibit any horse at any horse show or horse exhibition, or sell, auction, or purchase any horse sold at a horse sale or horse auction at which he or she has been appointed to inspect horses;

(ii) A DQP shall not inspect horses at any horse show, horse exhibition, horse sale or horse auction in which a horse or horses owned by a member of the DQP's immediate family or the DQP's employer are competing or are being offered for sale;

(iii) A DQP shall follow the uniform inspection procedures of his

certified organization or association when inspecting horses; and

(iv) The DQP shall immediately inform management of each case regarding any horse which, in his opinion, is in violation of the Act or regulations.

(e) *Prohibition of appointment of certain persons to perform duties under the Act.* The management of any horse show, horse exhibition, horse sale, or horse auction shall not appoint any person to detect and diagnose horses which are sore or to otherwise inspect horses for the purpose of enforcing the Act, if that person:

(1) Does not hold a valid, current DQP license issued by a horse industry organization or association having a DQP program certified by the Department.

(2) Has had his DQP license canceled by the licensing organization or association.

(3) Is disqualified by the Secretary from performing diagnosis, detection, and inspection under the Act, after notice and opportunity for a hearing, when the Secretary finds that such person is unfit to perform such diagnosis, detection, or inspection because he has failed to perform his duties in accordance with the Act or regulations, or because he has been convicted of a violation of any provision of the Act or regulations occurring after July 13, 1976, or has paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976.

(f) *Cancellation of DQP license.* (1) Each horse industry organization or association having a DQP program certified by the Department shall issue a written warning to any DQP whom it has licensed who violates the rules, regulations, by-laws, or standards of conduct promulgated by such horse industry organization or association pursuant to this section, who fails to follow the procedures set forth in § 11.21 of this part, or who otherwise carries out his duties and responsibilities in a less than satisfactory manner, and shall cancel the license of any DQP after a second violation. Upon cancellation of his DQP license, the DQP may, within 30 days thereafter, request a hearing before a review committee of not less than three persons appointed by the licensing horse industry organization or association. If the review committee sustains the cancellation of the license, the DQP may appeal the decision of such committee to the Administrator within 30 days from the date of such decision, and the Administrator shall make a final determination in the matter. If the Administrator finds, after providing the DQP whose license has been canceled with a notice and an opportunity for a hearing, that there is sufficient cause for the committee's determination regarding license cancellation, he shall issue a decision sustaining such determination. If he does not find that there was sufficient cause to cancel

the license, the licensing organization or association shall reinstate the license.

(2) Each horse industry organization or association having a Department certified DQP program shall cancel the license of any DQP licensed under its program who has been convicted of any violation of the Act or regulations or of any DQP who has paid a fine or civil penalty in settlement of any alleged violation of the Act or regulations if such alleged violation occurred after July 13, 1976.

(g) *Revocation of DQP program certification of horse industry organizations or associations.* Any horse industry organization or association having a Department certified DQP program that has not received Department approval of the inspection procedures provided for in paragraph (b)(6) of this section, or that otherwise fails to comply with the requirements contained in this section, may have such certification of its DQP program revoked, unless, upon written notification from the Department of such failure to comply with the requirements in this section, such organization or association takes immediate action to rectify such failure and takes appropriate steps to prevent a recurrence of such noncompliance within the time period specified in the Department notification, or otherwise adequately explains such failure to comply to the satisfaction of the Department. Any horse industry organization or association whose DQP program certification has been revoked may appeal such revocation to the Administrator in writing within 30 days after the date of such revocation and, if requested, shall be afforded an opportunity for a hearing. All DQP licenses issued by a horse industry organization or association whose DQP program certification has been revoked shall expire 30 days after the date of such revocation, or 15 days after the date the revocation becomes final after appeal, unless they are transferred to a horse industry organization or association having a program currently certified by the Department.

9 C.F.R. §§ 11.1, .7 (1998) (footnotes omitted).

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises five issues in Respondent's Petition for Reconsideration. First, Respondent contends I erroneously concluded that Respondent may only obtain review of *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), in the United States Court of Appeals for the Tenth Circuit or the United States Court of Appeals for the District of Columbia Circuit. Respondent asserts he may also obtain review of *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), in the United States Court of Appeals for the Sixth Circuit. (Respondent's

Pet. for Recons. at 2-3).

Section 6(b)(2) of the Horse Protection Act (15 U.S.C. § 1825(b)(2)) provides that any person found to have violated the Horse Protection Act and assessed a civil penalty under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his or her place of business or in the United States Court of Appeals for the District of Columbia Circuit.

The record establishes that Respondent resides in and has his medical practice in Norman, Oklahoma (Compl. ¶ 1; Answer ¶ 1; RX D).¹ Therefore, Respondent may obtain review of *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), in the United States Court of Appeals for the Tenth Circuit or the United States Court of Appeals for the District of Columbia Circuit. However, citing *Fleming v. United States Dep't of Agric.*, 713 F.2d 179 (6th Cir. 1983), Respondent contends the United States Court of Appeals for the Sixth Circuit also has jurisdiction to review *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), because Respondent's "place of business, insofar as Tennessee Walkers are concerned, is in Tennessee" (Respondent's Pet. for Recons. at 2).

The record establishes that during the period August 1997 to approximately February 1999, which period includes the time of the violation alleged in the Complaint, Respondent stabled Missy, the horse at issue in this proceeding, at Young's Stables in Lewisberg, Tennessee, where Missy was trained and boarded by Ronal Young (CX 2, CX 4 at 1; Tr. 151-52, 174-76, 187). Respondent also kept other horses with Tim Gray at Sand Creek Farm in Shelbyville, Tennessee (RX C). Respondent made repeated visits to Tennessee to check on his horses (Tr. 153).²

In *Fleming*, a horse owner and resident of Alabama, C.H. Meadows, appealed *In re Albert Lee Rowland*, 40 Agric. Dec. 1934 (1981), an administrative proceeding in which Mr. Meadows was found to have violated section 5 of the Horse Protection Act (15 U.S.C. § 1824) and assessed a civil penalty, to the United States Court of Appeals for the Sixth Circuit. The Court found that it had jurisdiction over Mr. Meadows' appeal based on Mr. Meadows' keeping the horse at issue in the proceeding in Tennessee, as follows:

Title 15 U.S.C. § 1825(b)(2) provides jurisdiction in the United States Court of Appeals for the District of Columbia or in the circuit of the accused parties' residence. In this case the USDA alludes that Mr. Meadows actually resides in Alabama and is not, therefore, within the jurisdiction of the Sixth Circuit. While the record does show that Meadows resides in

¹See *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____, slip op. at 21 (Mar. 22, 2002).

²See *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____, slip op. at 21, 24-25, 43, 52, 59 (Mar. 22, 2002).

Alabama it also indicates that his place of business, insofar as Tennessee Walkers are concerned, is in Tennessee. It is there, at the Tennessee farm of Rowland, that Meadows keeps the horse at issue in this case. The USDA does not challenge this basis for jurisdiction. Nor have the parties addressed the issue of whether the language of § 1825(b)(2) imposes a jurisdictional condition or only one of venue. Under these circumstances, we find that this Court may properly exercise jurisdiction over Meadows' appeal.

Fleming v. United States Dep't of Agric., 713 F.2d 179, 181 n.3 (6th Cir. 1983).

I did not consider *Fleming* when I issued *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002). However, based on my reading of section 6(b)(2) of the Horse Protection Act (15 U.S.C. § 1825(b)(2)) and *Fleming*, I disagree with Respondent's contention that I erroneously found that Respondent may only obtain review of *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), in the United States Court of Appeals for the District of Columbia Circuit or the United States Court of Appeals for the Tenth Circuit. The statutory phrase "has his place of business" in section 6(b)(2) of the Horse Protection Act (15 U.S.C. § 1825(b)(2)) is written in the present tense, not in the past tense. The plain language of section 6(b)(2) of the Horse Protection Act (15 U.S.C. § 1825(b)(2)) indicates that the phrase refers to the time when notice of appeal is filed. While Respondent had his place of business, insofar as Tennessee Walkers are concerned, in Tennessee at the time the violation occurred, Respondent testified that he no longer owns any horses (Tr. 179, 185-86). Therefore, Respondent does not currently have a place of business, insofar as far as Tennessee Walkers are concerned, in Tennessee or anywhere else, and I conclude Respondent may not obtain review of *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), in the United States Court of Appeals for the Sixth Circuit.

Second, Respondent contends I erred in applying United States Department of Agriculture precedent that a horse owner who allows a person to enter the owner's horse in a horse show or horse exhibition for the purpose of showing or exhibiting the horse is a guarantor that the horse will not be sore when the horse is entered in that horse show or horse exhibition. Respondent argues that the cases I cited in support of this precedent³ are inapposite because each case relies on *In re Keith*

³See *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____, slip op. at 28 n.9 (Mar. 22, 2002) (citing *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996)).

Becknell, 54 Agric. Dec. 335 (1995), which states “[i]t has long been held that the exhibitor of a horse is an absolute guarantor that the training methods and the action devices used during a show will not sore the horse.” Respondent contends he owned Missy at the time of the violation, but he did not exhibit Missy at any time relevant to this proceeding; therefore, the extension of an exhibitor’s guarantor status to him is error. (Respondent’s Pet. for Recons. at 3-5).

As an initial matter, Respondent was an “exhibitor”⁴ of Missy on September 4, 1998, at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee. Therefore, even if I found that the United States Department of Agriculture precedent regarding owner-guarantor status is flawed, as Respondent argues, that finding would not alter the disposition of this proceeding because, as an exhibitor, Respondent was a guarantor that Missy would not be sore when she was entered for the purpose of showing or exhibiting her as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

Moreover, the United States Department of Agriculture’s long-standing position that a horse owner is a guarantor that his or her horse will not be sore when the horse is entered in a horse show or horse exhibition predates *Becknell* and was not modified by *Becknell*.⁵ Therefore, I reject Respondent’s contention that the United

⁴See 9 C.F.R. § 11.1.

⁵See *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 593 (2001) (stating an owner of a walking horse is an absolute guarantor that the horse he enters, either personally or through an agent, will not be entered in a show while sore), *appeal docketed*, No. 01-4204 (6th Cir. Nov. 14, 2001); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 589-90 (1997) (stating an owner who allows a person to enter the owner’s horse in a horse show or horse exhibition for the purpose of exhibiting the horse is an absolute guarantor that the horse will not be sore when exhibited), *aff’d per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 979 (1996) (stating an owner who allows a person to exhibit a horse in a horse show or horse exhibition is an absolute guarantor that the horse will not be sore when the horse is exhibited), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 888 (1996) (stating horse owners who allow the entry of horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition are absolute guarantors that those horses will not be sore when entered); *In re Mike Thomas*, 55 Agric. Dec. 800, 843 (1996) (stating persons who enter horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition and owners who allow such activity are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when entered); *In re Jackie McConnell*, 44 Agric. Dec. 712, 724 (1985) (stating the Horse Protection Act and the regulations issued under the Horse Protection Act make the owners and exhibitors absolute guarantors that action devices will not sore the horse), *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (1992); *In re Eldon Stamper*, 42 Agric. Dec. 20, 28 (1983) (stating the Horse Protection Act and the regulations issued under the Horse Protection Act make persons subject to the Horse Protection Act absolute guarantors that the use of action devices does not cause a horse to be sore), *aff’d*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in*

States Department of Agriculture's position on the owner's status as a guarantor is an unexplained extension of *Becknell*.

Third, Respondent contends that I improperly changed the decision of the ALJ to come to the conclusion that Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Respondent's Pet. for Recons. at 2).

I agree with the ALJ's conclusion that Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).⁶ However, based on my disagreement with portions of the ALJ's discussion and the sanction imposed by the ALJ, I did not adopt the ALJ's Initial Decision and Order as the final Decision and Order.⁷

The Judicial Officer is not bound by an administrative law judge's initial decision and order and may reject the initial decision and order in whole or in part. The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

....

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that

51 Agric. Dec. 302 (1992); *In re Richard L. Thornton*, 41 Agric. Dec. 870, 888 (1982) (stating the owner or exhibitor of a horse is an absolute guarantor that the action devices used during a show will not sore the horse), *aff'd*, 715 F.2d 1508 (11th Cir. 1983); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1943 (1981) (stating the owner or exhibitor of a horse is an absolute guarantor that the action devices used during a show will not sore the horse), *aff'd*, 713 F.2d 179 (6th Cir. 1983).

⁶See Initial Decision and Order at 13; *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ___, slip op. at 3, 39 (Mar. 22, 2002).

⁷See *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ___, slip op. at 3 (Mar. 22, 2002).

decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

Appeals and review. . . .

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

Similarly, the Rules of Practice provide that the Judicial Officer *may* adopt the administrative law judge's initial decision and order, as follows:

§ 1.145 Appeal to Judicial Officer.

. . . .

(i) *Decision of the judicial officer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

7 C.F.R. § 1.145(i).

Therefore, I reject Respondent's contention that my failure to adopt the ALJ's Initial Decision and Order as the final Decision and Order is error.

Fourth, Respondent contends that *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995), is inapposite because *Crawford* holds that a horse owner is liable for the actions of the owner's agents and, while Respondent hired Ronal Young as a horse trainer, no proof exists in the record that Ronal Young served as Respondent's agent (Respondent's Pet. for Recons. at 5-10).

I disagree with Respondent's contention that *Crawford* is inapposite because it does not relate to a horse owner's liability for the actions of the horse trainers who the horse owner hires. *Crawford* upheld as reasonable the test used by the United States Department of Agriculture to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). The Court describes the United States Department of Agriculture's position as one which "merely holds the owner responsible for the actions of her agents (*particularly the trainer*) and will not permit the owner to escape liability by testifying that she instructed a *trainer* not to sore." *Crawford*, 50 F.3d at 51 (emphasis added). Thus, under *Crawford*, a horse trainer is the horse owner's agent and, specifically, an agent for whose actions the horse owner is liable.

Moreover, I disagree with Respondent's assertion that there is no evidence that Ronal Young served as Respondent's agent. The evidence establishes that Respondent hired Ronal Young to board, train, and show Missy in August 1997, and Respondent continued to employ Ronal Young in this capacity for approximately 6 months after Ronal Young entered Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration while she was sore (CX 4; Tr. 151-52, 174-76, 187). Generally, an agent is one who is authorized to act for or in place of another.⁸ Respondent authorized Ronal Young to act for and in place of Respondent with respect to the boarding, training, and showing of Missy; thus, I find that Ronal Young was

⁸See Black's Law Dictionary 64 (7th ed. 1999). See also *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1278 (10th Cir. 2000) (stating an agent is a person authorized by another to act on his behalf and under his control); *Brunswick Leasing Corp. v. Wisconsin Central, Ltd.*, 136 F.3d 521, 526 (7th Cir. 1998) (stating generally, an agent is one who undertakes to manage some affairs to be transacted for another by his authority, on account of the latter, who is called the principal, and to render an accounting); *Nelson v. Serwold*, 687 F.2d 278, 282 (9th Cir. 1982) (stating the agent acts for or on behalf of the principal and subject to his control, and his acts are those of the principal); *NLRB v. United Brotherhood of Carpenters*, 531 F.2d 424, 426 (9th Cir. 1976) (stating an agent acts for and on behalf of his principal and subject to his control); *Wasilowski v. Park Bridge Corp.*, 156 F.2d 612, 614 (2d Cir. 1946) (stating an agent is a person authorized by another to act on his account and under his control); *Kunz v. Lowden*, 124 F.2d 911, 913 (10th Cir. 1942) (stating whether one is the agent of another for a specific purpose depends upon whether he has power to act with reference to the subject matter).

Respondent's agent at all times material to this proceeding.

Fifth, Respondent requests that I consider the instant proceeding in light of *Lewis v. Secretary of Agric.*, 73 F.3d 312 (11th Cir. 1996); *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994); and *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982) (Respondent's Pet. for Recons. at 9-10).

Even if I were to apply the test adopted by the United States Court of Appeals for the Eighth Circuit or the test adopted by the United States Court of Appeals for the Eleventh Circuit to determine whether Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as Respondent requests, I would not dismiss the Complaint. The United States Court of Appeals for the Eighth Circuit in *Burton* held, as follows:

[W]e hold that the owner cannot be held to have "allowed" a "sore" horse to be shown [in violation of 15 U.S.C. § 1824(2)(D)] when the following three factors are shown to exist: (1) there is a finding that the owner had no knowledge that the horse was in a "sore" condition, (2) there is a finding that a Designated Qualified Person examined and approved the horse before entering the ring, and (3) there was uncontradicted testimony that the owner had directed the trainer not to show a "sore" horse. All of these factors taken together are sufficient to excuse an owner from liability.

Burton v. United States Dep't of Agric., 683 F.2d 280, 283 (8th Cir. 1982).

The United States Court of Appeals for the Eleventh Circuit in *Lewis* adopted *Burton* with the caveat that the owner's directions to the trainer not to show a sore horse must be meaningful, as follows:

The caveat we put on *Burton* relates to the third factor. Compliance with it (along with the other two factors), frees the owner of the ineluctable consequences of entry plus the fact of soreness and it frees him of being found to "allow" in the passive sense described in *Baird* by "hiding his head" or doing nothing. But compliance with the third element must be meaningful rather than purely formal or ritualistic. The owner may give firm and certain and suitably repeated directions not to sore and not to show a horse that is in a sore condition. He may maintain a training environment that discourages soring or makes it impossible. He may carry out inspection practices that tend to reveal any efforts to sore. But, whatever the form, his efforts must be meaningful and not a mere formalistic evasion.

Lewis v. Secretary of Agric., 73 F.3d 312, 317 (11th Cir. 1996).

The evidence clearly establishes that on September 4, 1998, two Designated

Qualified Persons⁹ examined Missy during a pre-show inspection at the 60th Annual Tennessee Walking Horse National Celebration and disqualified her from showing based upon her general appearance, locomotion, and reaction to palpation (CX 3b at 1, CX 3c; RX A; Tr. 51-52, 67, 69). The record contains no evidence that any Designated Qualified Person examined and approved Missy for showing or exhibition at the 60th Annual Tennessee Walking Horse National Celebration. Therefore, Respondent does not meet the requirement in *Burton* and *Lewis* that a Designated Qualified Person examine and approve the horse before the horse enters the ring.

However, if I were to apply the test adopted by the United States Court of Appeals for the Sixth Circuit in *Baird*, I would dismiss the Complaint against Respondent. The Sixth Circuit sets forth the test to determine whether an owner has allowed the entry of the owner's horse while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as follows:

In our view, the government must, as an initial matter, make out a prima facie case of a § 1824(2)(D) violation. It may do so by establishing (1) ownership; (2) showing, exhibition, or entry; and (3) soreness. If the government establishes a prima facie case, the owner may then offer evidence that he took an affirmative step in an effort to prevent the soring that occurred. Assuming the owner presents such evidence and the evidence is justifiably credited, it is up to the government then to prove that the admonitions the owner directed to his trainers concerning the soring of horses constituted merely a pretext or a self-serving ruse designed to mask what is in actuality conduct violative of § 1824.

Baird v. United States Dep't of Agric., 39 F.3d 131, 137 (6th Cir. 1994) (footnote omitted).

In *Baird*, the affirmative step to prevent the soring that occurred was the horse owner's direction to his trainers that his horses were not to be sored and his warning that he would take the horses away from trainers he suspected of soring his horses. The Court in *Baird* held that the horse owner's testimony alone, absent evidence to refute it, was sufficient to show that the horse owner did not "allow" his trainers to enter and exhibit his horses while sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). *Baird v. United States Dep't of Agric.*, 39 F.3d at 138.

Respondent testified that he took affirmative steps to prevent the soring of

⁹A Designated Qualified Person or DQP is an individual appointed by the management of a horse show and trained under a United States Department of Agriculture-sponsored program to inspect horses for compliance with the Horse Protection Act (15 U.S.C. § 1823; 9 C.F.R. §§ 11.1, .7).

Missy. Specifically, Respondent testified that he instructed Ronal Young not to sore Missy. Moreover, Respondent introduced Ronal Young's written statement (RX B) which corroborates Respondent's testimony that he instructed Ronal Young not to sore Missy. Complainant did not prove that Respondent's admonitions directed to Ronal Young concerning the soring of Missy constituted merely a pretext or a self-serving ruse designed to mask what is in actuality conduct violative of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). However, as discussed in this Order Denying Petition for Reconsideration, *supra*, Respondent cannot obtain judicial review in the United States Court of Appeals for the Sixth Circuit and the test in *Baird* to determine whether a respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) is not applicable to this proceeding.

For the foregoing reasons and the reasons set forth in *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.¹⁰ Respondent's Petition for Reconsideration was timely filed and automatically stayed the March 22, 2002, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration.

For the foregoing reasons, the following Order should be issued.

ORDER

1. Respondent Robert B. McCloy, Jr., is assessed a \$2,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

¹⁰*In re William J. Reinhart*, 60 Agric. Dec. 241, 263 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re David Tracy Bradshaw*, 59 Agric. Dec. 790, 793 (2000) (Order Denying Pet. for Recons.).

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 30 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0020.

2. Respondent Robert B. McCloy, Jr., is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 30th day after service of this Order on Respondent.

3. Respondent Robert B. McCloy, Jr., has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of the notice of appeal by certified mail to the Secretary of Agriculture.¹¹ The date of this Order is June 20, 2002.

¹¹See 15 U.S.C. § 1825(b)(2), (c).